

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
May 8, 2001 Session

**IN THE MATTER OF THE ESTATE OF  
RUTH MARGARET CALFEE**

**Appeal from the Chancery Court for Bradley County  
No. P-92-050     Jerri S. Bryant, Chancellor**

**FILED MAY 31, 2001**

**No. E-2000-01720-COA-R3-CV**

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After this Court reversed a jury verdict of favor of the Will of Ruth Margaret Calfee, a second jury trial was conducted. The second jury also found in favor of the Will. Proceeding *pro se* on appeal, Appellants argue that the Trial Court erred in not granting a directed verdict in their favor on the issue of whether the decedent received independent advice concerning her Will. Appellants also claim error in the jury instructions that were given, and further assert that several other necessary jury instructions were not given at all. Because all of these issues have been waived, we affirm the judgment of the Trial Court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the  
Chancery Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, J., and CHARLES D. SUSANO, JR., J., joined.

Joyce Calfee Miller Utley, Jackson, Tennessee, *pro se* Appellant, Francis Calfee Jones, Susan Calfee Muhonen, Amy Calfee Criddle, and Theresa Calfee, Cleveland, Tennessee, *pro se* Appellants, and Nancy Calfee Barker, Denver, Colorado, *pro se* Appellant.

Roger E. Jenne, Cleveland, Tennessee, for the Appellees Earl Franklin Calfee, Jr., Geneva Calfee Adams, and Terry Calfee.

## OPINION

### Background

This is the second time this Court has considered an appeal in this matter. This litigation centers around the Will of Ruth Margaret Calfee ("Mrs. Calfee"), who died testate on March 1, 1992. The Appellants are Joyce Calfee Miller Utley, Francis Calfee Jones, Nancy Calfee Barker, Susan Calfee Muhonen, Amy Calfee Criddle, and Theresa Calfee ("Appellants"). Appellants are heirs under the Will and have brought this litigation contesting its validity. The Appellees are Earl Franklin Calfee, Jr., Geneva Calfee Adams, and Terry Calfee ("Appellees"). Appellees are proponents of the Will and also are heirs. Appellants claim, *inter alia*, that the proponents of the Will exercised undue influence in causing the Will to be drafted and executed. The first time this case was tried to a jury, the jury returned a verdict in favor of the Will, finding it to be the Last Will and Testament of the deceased, Mrs. Calfee. This Court reversed the jury verdict based in large part on an improper jury instruction concerning the applicable burden of proof.

The second jury trial began on March 13, 2000, and lasted approximately one week. The jury returned a unanimous verdict finding in favor of the Last Will and Testament of Mrs. Calfee. The Trial Court then entered judgment on the verdict. Although represented by counsel at both trials, Appellants are proceeding in this Court *pro se*. They filed a timely Notice of Appeal. No motion for a new trial or any other post-trial motion was filed with the Trial Court.

### Discussion

On Appeal, Appellants raise seventeen issues, sixteen of which assert error in the jury instructions. The first issue raised by Appellants is as follows:

The Court erred when the Court failed to order, as a matter of law, that Mrs. Calfee did not receive independent advice concerning her will. The Court erred when the Court did not order, as a matter of law, that Charles Burns was not an independent advisor to Mrs. Calfee.

In essence, the first issue challenges the Trial Court's failure to grant a directed verdict to Appellants on the issue of whether Mrs. Calfee received independent advice before or during the creation of her Will. We have reviewed the trial transcript and are unable to locate, nor have we been cited to, any place in the record where Appellants or their attorney moved for a directed verdict. Certainly, the Trial Court cannot be held to have committed error by not granting a directed verdict when one was never requested.

Even if a motion for a directed verdict had been made at trial, Appellants' failure to file any post-trial motion on this issue prohibits appellate review. In *Mires v. Clay*, 3 S.W.3d 463 (Tenn. Ct. App. 1999), this Court observed that when the alleged error is the failure of the trial court

to grant a directed verdict, either a motion for a new trial or a motion seeking entry of judgment in accordance with the motion for directed verdict made at trial would be sufficient to preserve the issue for appeal. “Failure to file either of these post-trial motions, however, denies ‘the trial judge the opportunity to consider or reconsider alleged errors committed during the course of trial’ and precludes appellate review of that issue.” *Mires*, 3 S.W.3d at 468 (quoting *Cortez v. Alutech, Inc.*, 941 S.W.2d 891, 894 (Tenn. App. 1996)). As noted in *Mires*, this rationale is supported by Rule 36(a) of the Tenn. R. App. P. which provides that “[n]othing in this rule shall be construed as requiring relief be granted to a party . . . who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.” *Mires*, 3 S.W.3d at 468. See also *McKinney v. Smith County*, 1999 WL 1000887 at \*3, No. M1998-00074-COA-R3-CV (Tenn. Ct. App., Nov. 5, 1999)(“This court recently held that an appellant’s failure to file [a motion for a new trial or a motion for judgment notwithstanding the verdict] precluded appellate review of a directed verdict issue.”). In the present case, not only was no post-trial motion filed, no motion for directed verdict was presented to the Trial Court for consideration. Accordingly, this issue was not preserved appropriately for appeal and is waived.

Appellants’ issues numbered Two, Three, Four, Five, Eleven, and Sixteen all assert error in the jury charge that was given by the Trial Court to the jury. Appellants claim that these jury charges were defective under the law. Appellants’ issues numbered Six, Seven, Eight, Nine, Ten, Twelve, Thirteen, Fourteen, Fifteen, and Seventeen all allege error based on jury instructions Appellants claim should have been given but were not.

Tenn. R. App. P. 3(e) provides, in relevant part, that:

[I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived. . . .

As recently set forth by our Supreme Court, when an appellate court reviews under Rule 3(e) a motion for a new trial, the motion should be viewed in a light most favorable to the appellant, and the appellate court should resolve any doubt in favor of preserving the issue. *Fahey v. Eldridge*, No. M1999-00500-SC-R11-CV (Tenn. S. Ct., March 22, 2001). Appellants, however, never filed a motion for a new trial.

With respect to Appellants’ issues where they claim the Trial Court erred when it failed to give specific jury instructions, the law in Tennessee is that “[a] party cannot allege error for omissions in the charge without submitting a request setting forth the correct instructions.” *Jones v. Tennessee Farmers Mutual Insurance Co.*, 896 S.W.2d 553, 556 (Tenn. Ct. App. 1994). In *Rule v. Empire Gas Corp.*, 563 S.W.2d 551, 554 (Tenn. 1978), our Supreme Court held that

notwithstanding the language of Rule 51.02 of the Tenn R. Civ. P., a party has a duty to point out to the trial court any omission in the jury charge. Specifically, the Court stated:

We hold that Rule 51.02 of the Tennessee Rules of Civil Procedure has not abolished or altered the rule announced in the *Provence* [v. Williams, 62 Tenn. App 371, 462 S.W.2d 885 (1970)] and *Holmes* [v. American Bakeries Co., 62 Tenn. App. 601, 466 S.W.2d 502 (1970)] cases . . . that in order to predicate error upon an alleged omission in the instructions given to the jury by the trial judge he must have pointed out such omission to the trial judge at trial by an appropriate request for instruction.

In the present case, after the Trial Court gave its instructions to the jury, counsel for both Appellants and Appellees were specifically asked if they had any exceptions to the instructions, and both attorneys responded “No”. This is not a situation where jury instructions were requested by Appellants but refused by the Trial Court. Since Appellants never pointed out these claimed omissions to the Trial Judge at trial by submitting any appropriate requests for these instructions, any claimed error with regard to these alleged omissions is waived. The Trial Court did not commit error by omitting to give any such instructions since Appellants never requested these instructions.

When error is alleged as to a jury instruction that is actually given to the jury or is requested and refused (as opposed to an omission or failure to give an instruction not requested), the rule is somewhat different although here the result is the same. When the alleged error concerns a jury instruction actually given to the jury, there is no requirement that the appropriate instruction be provided to the trial court. In fact, there is no duty to object to the instruction at trial (although the better practice certainly would be to point out any problem to the trial court). See *Grandstaff v. Hawks*, 36 S.W.3d 482, 489 (Tenn. Ct. App. 2000) (“Tenn. R. Civ. P. 51.02 provides that a party may seek a new trial because of an inaccurate instruction, even if it did not object to the instruction at trial.”). There is, however, a requirement that a motion for new trial be filed setting forth the specific objectionable material. In *In re: Estate of Ruby Hazel Mitchell*, 1995 WL 546928, No. 03A019409-CH-00317 (Tenn. Ct. App., Sept. 15, 1995) this Court held that the appellant’s challenge to the jury instructions given by the trial court were waived when no motion for new trial was filed. Specifically, this Court stated:

In all cases that are tried by a jury . . . a motion for new trial must be filed with the trial court within thirty days . . . . T.R.A.P. 3(e); T. R. Civ. P. 59.02. In order to preserve an issue regarding erroneous jury instructions for appeal, an appellant must set forth in a motion for new trial the specific objectionable portions of such instructions. *Loeffler v. Kjellgren*, 884 S.W.2d 463, 472 (Tenn. App. 1994), *Mitchell v. Jennings*, 836 S.W.2d 575, 578 (Tenn. App. 1992). Otherwise, the issues are deemed waived and may not be considered

on appeal. *Boyd v. Hicks*, 774 S.W.2d 622, 625 (Tenn. App. 1989);  
*Flynn v. Shoney's, Inc.*, 850 S.W.2d 458 (Tenn. App. 1992)....

The requirement that a motion for new trial be filed following a jury trial in order to maintain an appeal is hardly novel in Tennessee. In fact, this requirement existed long before the rules of appellate procedure were promulgated. *See, e.g., Memphis St. Ry. Co. v. Johnson*, 83 S.W. 169, 114 Tenn. 632 (Tenn. 1905).

*In re: Estate of Ruby Hazel Mitchell*, 1995 WL 546928 at \*1, \*2. Because Appellants did not file a motion for new trial setting forth their objections to the jury instructions that were given, these issues are also deemed waived.

### **Conclusion**

The judgment of the Trial Court is affirmed. This case is remanded to the Trial Court for further proceedings as necessary, if any, consistent with this Opinion. Costs of this Appeal are taxed to the Appellants Joyce Calfee Miller Utley, Francis Calfee Jones, Nancy Calfee Barker, Susan Calfee Muhonen, Amy Calfee Criddle, and Theresa Calfee, and their sureties.

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D. MICHAEL SWINEY, JUDGE